



March 23, 2018

VIA FOIAONLINE.REGULATIONS.GOV

U.S. Environmental Protection Agency

Re: Freedom of Information Act Request: Open Comment Period on Chlorpyrifos, Diazinon, and Malathion Assessment

Dear FOIA Officer:

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, *as amended* ("FOIA"), from the Center for Biological Diversity ("Center"), a non-profit organization that works to secure a future for all species hovering on the brink of extinction through science, law, and creative media, and to fulfill the continuing educational goals of its membership and the general public in the process.

REQUESTED RECORDS

The Center requests from the U.S. Environmental Protection Agency ("EPA") Headquarters:

1. All records generated in connection with EPA's decision to open a comment period on the National Marine Fisheries Service ("NMFS") assessment on chlorpyrifos, diazinon and malathion. *See EPA Press Release*, "EPA Opens Comment Period on NMFS's Assessment on Chlorpyrifos, Diazinon, and Malathion," <https://www.epa.gov/pesticides/epa-opens-comment-period-nmfss-assessment-chlorpyrifos-diazinon-and-malathion> (last visited Mar. 23, 2018); and
2. All records mentioning, including, and/or referencing connection with the January 31, 2018 letter Brett Hartl sent to EPA requesting a stakeholder workshop. Attachment A (Brett Hartl's January 31, 2018 Stakeholder Workshop Letter).

For this request, the term "all records" refers to, but is not limited to, any and all documents, correspondence (including, but not limited to, inter and/or intra-agency correspondence as well as correspondence with entities or individuals outside the federal government), emails, letters, notes, recordings, telephone records, voicemails, telephone notes, telephone logs, text messages, chat messages, minutes, memoranda, comments, files, presentations, consultations, biological opinions, assessments, evaluations, schedules, papers published and/or unpublished, reports, studies, photographs and other images, data (including raw data, GPS or GIS data, UTM, LiDAR, etc.), maps, and/or all other responsive records, in draft or final form.

This request is not meant to exclude any other records that, although not specially requested, are reasonably related to the subject matter of this request. If you or your office have destroyed or

determine to withhold any records that could be reasonably construed to be responsive to this request, I ask that you indicate this fact and the reasons therefore in your response.

Under the FOIA Improvement Act of 2016, agencies are prohibited from denying requests for information under FOIA unless the agency reasonably believes release of the information will harm an interest that is protected by the exemption. FOIA Improvement Act of 2016 (Public Law No. 114-185), codified at 5 U.S.C. § 552(a)(8)(A).

If you decide to invoke a FOIA exemption, please include sufficient information for us to assess the basis for the exemption, including any interest(s) that would be harmed by release. Please include a detailed ledger which includes:

1. Basic factual material about each withheld record, including the originator, date, length, general subject matter, and location of each item; and
2. Complete explanations and justifications for the withholding, including the specific exemption(s) under which the record (or portion thereof) was withheld and a full explanation of how each exemption applies to the withheld material. Such statements will be helpful in deciding whether to appeal an adverse determination. Your written justification may help to avoid litigation.

If you determine that portions of the records requested are exempt from disclosure, we request that you segregate the exempt portions and mail the non-exempt portions of such records to my attention at the address below within the statutory time limit. 5 U.S.C. § 552(b).

The Center is willing to receive records on a rolling basis.

Finally, FOIA's "frequently requested record" provision was enacted as part of the 1996 Electronic Freedom of Information Act Amendments, and requires all federal agencies to give "reading room" treatment to any FOIA-processed records that, "because of the nature of their subject matter, the agency determines have become the subject of subsequent requests for substantially the same records." *See* 5 U.S.C. § 552(a)(2)(D)(ii)(I). Also, enacted as part of the 2016 FOIA Improvement Act, FOIA's Rule of 3 requires all federal agencies to proactively "make available for public inspection in an electronic format" "copies of records, regardless of form or format ... that have been released to any person ... and ... that have been requested 3 or more times." 5 U.S.C. § 552(a)(2)(D)(ii)(II). Therefore, we respectfully request that you make available online any records that the agency determines will become the subject of subsequent requests for substantially the same records, and records that have been requested three or more times.

FORMAT OF REQUESTED RECORDS

Under FOIA, you are obligated to provide records in a readily accessible electronic format and in the format requested. *See, e.g.,* 5 U.S.C. § 552(a)(3)(B) ("In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.").

“Readily accessible” means text-searchable and OCR-formatted. *See* 5 U.S.C. § 552(a)(3)(B). Pursuant to this requirement, we hereby request that you produce all records in an electronic format and in their native file formats. Additionally, please provide the records in a load-ready format with a CSV file index or Excel spreadsheet. If you produce files in .PDF format, then please omit any “portfolios” or “embedded files.” Portfolios and embedded files within files are not readily accessible. Please do not provide the records in a single, or “batched,” .PDF file. We appreciate the inclusion of an index.

If you should seek to withhold or redact any responsive records, we request that you: (1) identify each such record with specificity (including date, author, recipient, and parties copied); (2) explain in full the basis for withholding responsive material; and (3) provide all segregable portions of the records for which you claim a specific exemption. 5 U.S.C. § 552(b). Please correlate any redactions with specific exemptions under FOIA.

RECORD DELIVERY

We appreciate your help in expeditiously obtaining a determination on the requested records. As mandated in FOIA, we anticipate a reply within 20 working days. 5 U.S.C. § 552(a)(6)(A)(i). Failure to comply within the statutory timeframe may result in the Center taking additional steps to ensure timely receipt of the requested materials. Please provide a complete reply as expeditiously as possible. You may email or mail copies of the requested records to:

Margaret E. Townsend
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211
foia@biologicaldiversity.org

If you find that this request is unclear, or if the responsive records are voluminous, please call me at (971) 717-6409 to discuss the scope of this request.

REQUEST FOR FEE WAIVER

FOIA was designed to provide citizens a broad right to access government records. FOIA’s basic purpose is to “open agency action to the light of public scrutiny,” with a focus on the public’s “right to be informed about what their government is up to.” *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). In order to provide public access to this information, FOIA’s fee waiver provision requires that “[d]ocuments shall be furnished without any charge or at a [reduced] charge,” if the request satisfies the standard. 5 U.S.C. § 552(a)(4)(A)(iii). FOIA’s fee waiver requirement is “liberally construed.” *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005).

The 1986 fee waiver amendments were designed specifically to provide non-profit organizations such as the Center access to government records without the payment of fees. Indeed, FOIA’s fee waiver provision was intended “to prevent government agencies from using high fees to

discourage certain types of requesters and requests,” which are “consistently associated with requests from journalists, scholars, and *non-profit public interest groups*.” *Ettlinger v. FBI*, 596 F.Supp. 867, 872 (D. Mass. 1984) (emphasis added). As one Senator stated, “[a]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information” 132 Cong. Rec. S. 14298 (statement of Senator Leahy).

I. The Center Qualifies for a Fee Waiver.

Under FOIA, a party is entitled to a fee waiver when “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the [Federal] government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). EPA’s regulations at 40 C.F.R. § 2.107(l)(1)-(3) establish the same standard.

Thus, EPA must consider four factors to determine whether a request is in the public interest: (1) whether the subject of the requested records concerns “the operations or activities of the Federal government,” (2) whether the disclosure is “likely to contribute” to an understanding of government operations or activities, (3) whether the disclosure “will contribute to public understanding” of a reasonably broad audience of persons interested in the subject, and (4) whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities. 40 C.F.R. § 2.107(l)(2). As shown below, the Center meets each of these factors.

A. The Subject of This Request Concerns “The Operations and Activities of the Government.”

The subject matter of this request concerns the operations and activities of the EPA. This request asks for: (1) all records generated in connection with EPA’s decision to open a comment period on the National Marine Fisheries Service (“NMFS”) assessment on Chlorpyrifos, Diazinon and Malathion. *See EPA Press Release*, “EPA Opens Comment Period on NMFS’s Assessment on Chlorpyrifos, Diazinon, and Malathion,” <https://www.epa.gov/pesticides/epa-opens-comment-period-nmfss-assessment-chlorpyrifos-diazinon-and-malathion> (last visited Mar. 23, 2018); and (2) all records mentioning, including, and/or referencing connection with the January 31, 2018 letter Brett Hartl sent to EPA requesting a stakeholder workshop. Attachment A (Brett Hartl’s January 31, 2018 Stakeholder Workshop Letter).

This FOIA will provide the Center and the public with crucial insight into EPA’s decision to open a comment period on the NMFS Assessment on chlorpyrifos, diazinon and malathion. It is clear that a federal agency opening a comment period concerning pesticides is a specific and identifiable activity of the government, in this case the executive branch agency, the EPA. *Judicial Watch*, 326 F.3d at 1313 (“[R]easonable specificity is all that FOIA requires with regard to this factor”) (internal quotations omitted). Thus, the Center meets this factor.

B. Disclosure is “Likely to Contribute” to an Understanding of Government Operations or Activities.

The requested records are meaningfully informative about government operations or activities and will contribute to an increased understanding of those operations and activities by the public.

Disclosure of the requested records will allow the Center to convey to the public information about how EPA assesses the impacts of pesticides on endangered species, and to what extent EPA’s decision making is being influenced by improper political pressure at the request of industry stakeholders. Once the information is made available, the Center will analyze it and present it to its 1.6 million members and online activists and the general public in a manner that will meaningfully enhance the public’s understanding of this topic.

Thus, the requested records are likely to contribute to an understanding of EPA operations and activities.

C. Disclosure Of The Requested Records Will Contribute To A Reasonably Broad Audience Of Interested Persons’ Understanding Of EPA’s Decision To Open The Comment Period On Chlorpyrifos, Diazinon, And Malathion Assessment

The requested records will contribute to public understanding of whether EPA’s actions are consistent with its mission to “to protect human health and the environment.”¹ As explained above, the records will contribute to public understanding of this topic.

Activities of EPA generally, and specifically its decision to open the comment period on toxic pesticides are areas of interest to a reasonably broad segment of the public. The Center will use the information it obtains from the disclosed records to educate the public at large about this subject matter. *See W. Watersheds Proj. v. Brown*, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004) (“... find[ing] that WWP adequately specified the public interest to be served, that is, educating the public about the ecological conditions of the land managed by the BLM and also how ... management strategies employed by the BLM may adversely affect the environment.”).

Through the Center’s synthesis and dissemination (by means discussed in Section II, below), disclosure of information contained in and gleaned from the requested records will contribute to a broad audience of persons who are interested in the subject matter. *Ettlinger v. FBI*, 596 F.Supp. at 876 (benefit to a population group of some size distinct from the requester alone is sufficient); *Carney v. Dep’t of Justice*, 19 F.3d 807, 815 (2d Cir. 1994), *cert. denied*, 513 U.S. 823 (1994) (applying “public” to require a sufficient “breadth of benefit” beyond the requester’s own interests); *Cnty. Legal Servs. v. Dep’t of Hous. & Urban Dev.*, 405 F.Supp.2d 553, 557 (E.D. Pa. 2005) (in granting fee waiver to community legal group, court noted that while the requester’s “work by its nature is unlikely to reach a very general audience,” “there is a segment of the public that is interested in its work”).

¹ EPA, *Our Mission and What We Do*, <https://www.epa.gov/aboutepa/our-mission-and-what-we-do> (last visited Mar, 23, 2018).

Indeed, the public does not currently have an ability to easily evaluate the requested records that are not currently in the public domain, which concern EPA's decision to open the comment period on various pesticides, and records generated in connection to Brett Hartl's letter. *See Cmty. Legal Servs. v. HUD*, 405 F.Supp.2d 553, 560 (D. Pa. 2005) (because requested records "clarify important facts" about agency policy, "the CLS request would likely shed light on information that is new to the interested public."). As the Ninth Circuit observed in *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987), "[FOIA] legislative history suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations...".²

Disclosure of these records is not only "likely to contribute," but is certain to contribute, to public understanding of EPA's decision to open the pesticides' comment period. The public is always well served when it knows how the government conducts its activities, particularly matters touching on legal questions. Hence, there can be no dispute that disclosure of the requested records to the public will educate the public about EPA's decision making and subjectivity to industry influence.

D. Disclosure is Likely to Contribute Significantly to Public Understanding of Government Operations or Activities.

The Center is not requesting these records merely for their intrinsic informational value. Disclosure of the requested records will significantly enhance the public's understanding of to what extent EPA's decision making is being influenced by improper political pressure at the request of industry stakeholders, as compared to the level of public understanding that exists prior to the disclosure. Indeed, public understanding will be *significantly* increased as a result of disclosure because the requested records will help reveal more about this topic.

The records are also certain to shed light on EPA's compliance with its mission.³ Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. Thus, the Center meets this factor as well.

II. The Center has a Demonstrated Ability to Disseminate the Requested Information Broadly.

The Center is a non-profit organization that informs, educates, and counsels the public regarding environmental issues, policies, and laws relating to environmental issues. The Center has been substantially involved in the activities of numerous government agencies for over 25 years, and has consistently displayed its ability to disseminate information granted to it through FOIA.

² In this connection, it is immaterial whether any portion of the Center's request may currently be in the public domain because the Center requests considerably more than any piece of information that may currently be available to other individuals. *See Judicial Watch*, 326 F.3d at 1315.

³ *See supra* note 1.

In consistently granting the Center's fee waivers, agencies have recognized: (1) that the information requested by the Center contributes significantly to the public's understanding of the government's operations or activities; (2) that the information enhances the public's understanding to a greater degree than currently exists; (3) that the Center possesses the expertise to explain the requested information to the public; (4) that the Center possesses the ability to disseminate the requested information to the general public; (5) and that the news media recognizes the Center as an established expert in the field of imperiled species, biodiversity, and impacts on protected species. The Center's track record of active participation in oversight of governmental activities and decision making, and its consistent contribution to the public's understanding of those activities as compared to the level of public understanding prior to disclosure are well established.

The Center intends to use the records requested here similarly. The Center's work appears in more than 2,500 news stories online and in print, radio and TV per month, including regular reporting in such important outlets as *The New York Times*, *Washington Post*, *The Guardian*, and *Los Angeles Times*. Many media outlets have reported on the improper influence of industry on EPA, utilizing information obtained by the Center from federal agencies. In 2017, more than 2.7 million people visited the Center's extensive website, and viewed pages a total of 5.7 million times. The Center sends out more than 277 email newsletters and action alerts per year to more than 1.6 million members and supporters. Three times a year, the Center sends printed newsletters to more than 63,000 members. More than 304,800 people have "liked" the Center on Facebook, and there are regular postings regarding environmental health. The Center also regularly tweets to more than 57,900 followers on Twitter. The Center intends to use any or all of these far-reaching media outlets to share with the public information obtained as a result of this request.

Public oversight and enhanced understanding of the EPA's duties is absolutely necessary. In determining whether disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the information to a reasonably broad audience of persons interested in the subject. *Carney v U.S. Dept. of Justice*, 19 F.3d 807 (2nd Cir. 1994). The Center need not show how it intends to distribute the information, because "[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity." *Judicial Watch*, 326 F.3d at 1314. It is sufficient for the Center to show how it distributes information to the public generally. *Id.*

III. Obtaining the Requested Records is of No Commercial Interest to the Center.

Access to government records, disclosure forms, and similar materials through FOIA requests is essential to the Center's role of educating the general public. Founded in 1994, the Center is a 501(c)(3) nonprofit conservation organization (EIN: 27-3943866) with more than 1.6 million members and online activists dedicated to the protection of endangered and threatened species and wild places. The Center has no commercial interest and will realize no commercial benefit from the release of the requested records.

IV. Conclusion

For all of the foregoing reasons, the Center qualifies for a full fee waiver. We hope that the EPA will immediately grant this fee waiver request and begin to search and disclose the requested records without any unnecessary delays.

If you have any questions, please contact me at (971) 717-6409 or foia@biologicaldiversity.org. All records and any related correspondence should be sent to my attention at the address below.

Sincerely,

A handwritten signature in black ink, appearing to read "Margaret E. Townsend", with a long horizontal flourish extending to the right.

Margaret E. Townsend
Open Government Staff Attorney
CENTER FOR BIOLOGICAL DIVERSITY
P.O. Box 11374
Portland, OR 97211-0374
foia@biologicaldiversity.org

Attachment

Attachment A (Brett Hartl's January 31, 2018 Stakeholder Workshop Letter)

Attachment A



January 31, 2018

Director Rick Keigwin
Office of Pesticide Programs
Environmental Protection Agency
2777 South Crystal Drive
Arlington, VA 22202

**Re: Request for Stakeholder Meeting on Endangered Species Act Pesticide
Consultations (referencing Docket #: EPA-HQ-OPP-2008-0850)**

Dear Director Keigwin,

On behalf of the Center for Biological Diversity, I am writing to request that EPA convene a stakeholder meeting in the spring of this year to (1) provide the public an opportunity to offer feedback and learn about how EPA plans to implement the National Marine Fisheries Service's final biological opinion on chlorpyrifos, diazinon, and malathion, (2) provide the public with information regarding EPA's new efforts to obtain additional data on pesticide usage for the Fish and Wildlife Service with respect to the above three chemicals, and (3) the EPA's progress or lack thereof in these efforts.

Since January of 2017, the EPA has failed to provide the public with meaningful information in any context regarding its efforts to protect endangered species under the Endangered Species Act. Indeed since April of 2017, when Dow Chemical and CropLife America requested that EPA completely scrap the Interim Approaches — effectively negating years of agency work and public input — the EPA has failed to provide any substantive or accurate updates on this vital conservation work to protect our most imperiled animals and plants from these pesticides.

EPA now appears to be embarking on a cynical effort to sabotage the completion of the Fish and Wildlife Service biological opinion — delaying protections for hundreds of endangered species. Just *one week* after the PPDC meeting in November, in which the EPA represented that it was working in good faith to complete the pilot biological opinions in a timely fashion, the National Marine Fisheries Service requested two additional years to complete the biological opinions. It is incredible and implausible that your agency was unaware that this request was forthcoming and instead chose to deliberately mislead the public. Indeed, just one week after that NMFS request, the EPA and the Fish and Wildlife Service conveniently exchanged letters justifying an indefinite delay for the completion of the FWS biological opinions.

Whatever is actually going on within EPA, the public has a right to know and understand EPA's progress or lack thereof regarding its legal obligations to protect endangered species from pesticides. Perhaps the Office of Pesticide Programs has a more positive view regarding its current efforts. We often hear the claim that your office is very busy working on endangered species, despite the fact that EPA completed the first three biological evaluations ten months late, and appears to have made no progress whatsoever on the carbaryl and methomyl biological

evaluations. If we are incorrect and the Office of Pesticide Programs is still making progress to protect endangered species, it would be in EPA's interest to provide the public — including stakeholders from all sides — an opportunity to hear and learn about how EPA intends to move forward in the coming months and years to meet its substantive obligations under the Endangered Species Act. Given EPA's decades of non-compliance with the Endangered Species Act and near total disregard for public transparency, we are not hopeful you will grant this request. But perhaps you will surprise us.

Thank you for your consideration,

A handwritten signature in dark ink, appearing to read "Brett Hartl", with a long, sweeping horizontal line extending to the right.

Brett Hartl
Government Affairs Director
Center for Biological Diversity